

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA



In the Matter of the Appeal of }
THEBO, STARR AND ANDERTON, INC. }

Appearances:

For Appellant: B. F. Garrett

For Respondent: Chas. J. McColgan, Franchise Tax Commissioner

OP I N I O N

This is an appeal pursuant to Section 25 of the Bank and Corporation Franchise Tax Act (Chap. 13, Stats. 1929, as amended) from the action of the Franchise Tax Commissioner in overruling the protest of Thebo, Starr and Anderton, Inc., a corporation, to a proposed assessment of an additional tax in the amount of \$2,028.87 based upon its return for the year ended December 31, 1930.

In its return for the year ended December 30, 1930, Appellant deducted from gross income an item of \$11,834.60, designated as "losses on contracts," and allocated a portion of its net income to business done without the state. The Commissioner disallowed the deduction and the allocation of income to business done without the state, and accordingly proposed the additional assessment in question.

Subsequent to the filing of this appeal, the Appellant submitted evidence to the Commissioner which, the Commissioner **con-**cedes, establishes that the deduction of the \$11,834.60 item was proper. Thus, the only question presented for our determination is whether Appellant was entitled to allocate a portion of its income to business done without the state.

Appellant states that during the year 1930 it constructed several butane gas plants for Oregon and Washington corporations in towns located in Oregon and Washington. Appellant's work was to send crews to the towns selected, for which work it received fees based on the cost of the plants. It was on the basis of these activities that Appellant contends it was entitled to allocate a portion of its income for the year 1930 to business done without the state.

From the evidence adduced at the oral hearing held in this appeal, it appears that Appellant's principal place of business is located here and that the plans for the plants constructed in Oregon and Washington were drafted here. It also appears that Appellant did not qualify to do business in Oregon or Washington,

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did not have any permanent offices there and did not make any investments of capital there. Furthermore, it appears that although Appellant sent out engineers to supervise the construction, the corporations for whom the plants were constructed furnished the funds out of which the employees doing the work were paid and also furnished all the supplies necessary for the construction of the plants.

Section 10 of the Act provides that

"If the entire business of the bank or corporation is done within this state, the tax shall be according to or measured by its entire net income; and if the entire business of such bank or corporation is not done within this state, the tax shall be according to or measured by that portion thereof which is derived from business done within this state."

Under the above provision, it would seem that if the Appellant, in view of the above circumstances, can be regarded as having done business in Oregon or Washington during the year 1930, a portion of its income for that year should be allocated to business done without the state and not included in the measure of the tax. If, however, Appellant cannot be regarded as having engaged in business in Oregon or Washington, it would seem that the tax should be measured by its entire net income as proposed by the Commissioner.

There does not seem to be any general test laid down for determining whether a corporation is or is not doing business in a particular state. On the contrary, each case must be decided on its own merits with due consideration being given to all the surrounding circumstances. (See *St. Louis South Western Ry. Co. v. Alexander* 227 U. S. 227). Whether or not a corporation maintains an office within the state is, although not a controlling consideration, nevertheless a factor, and an important factor, to be considered in determining whether the corporation is doing business in the state. The same may be said with respect to whether a corporation has investments within the state and also with respect to whether its activities in the state are regular and continuous. (See *Spiegel-May Stern Co. v. Mitchel*, 125 Misc. Rep. 604; *Day & Co. v. Schiff, Lang & Co.*, 278 Fed. 533; *People ex rel Chicago Junction Ry. & Union Stockyards Co. v. Roberts*, 154 N. Y. 1; *International Fuel and Iron Corporation v. Donner Steel Co. Inc.*, 242 N. Y. 224).

Inasmuch as Appellant did not qualify to do business in Oregon or Washington, did not maintain permanent offices there, and did not make any investments of its capital there, and, inasmuch as its activities in those states were not regular and continuous but were confined to the supervising through its engineers of the construction of a number of plants for other corporations, we are of the opinion that Appellant cannot be regarded as having engaged in business within Oregon or Washington during the year 1930. It follows that we must hold that the Commissioner acted properly in disallowing an allocation of Appellant's income to business done without the state.

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O R D E R

Pursuant to the views expressed in the opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the action of the Franchise Tax Commissioner in overruling the protest of Thebo, Starr and Anderton, Inc. against a proposed assessment of an additional tax in the amount of \$2,028.87 based upon the net income of said corporation for the year ended December 31, 1930, **be** and the same is hereby modified. Said action is reversed **in-**sofar as the Commissioner failed to allow the deduction of an item of \$11,834.60, representing losses on contracts, from the gross income of Thebo, Starr & Anderton, Inc. for the year ended December 31, 1930. In all other respects said action is sustained. The correct amount of the tax to be assessed to Thebo, Starr & Anderton Inc. is hereby determined as the amount produced by means of a computation, which will include the allowance as a deduction of the item of \$11,834.60 representing losses on contracts in the calculation thereof. The Commissioner is hereby directed to proceed in conformity with this order and to send Thebo, Starr & Anderton Inc. a notice of the assessment revised in accordance therewith.

Done at Sacramento, California, this 23rd day of April, 1934
by the State Board of Equalization.

R. E. Collins, Chairman
Fred E. Stewart, Member
John C. Corbett, Member
H. G. Cattell, Member

ATTEST: Dixwell L. Pierce, Secretary